

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMETRIUS D. HARDRICK,

Defendant-Appellant.

UNPUBLISHED

October 18, 2005

No. 256124

Wayne Circuit Court

LC No. 04-001402-01

Before: Owens, P.J., and Fitzgerald and Schuette, JJ.

PER CURIAM.

A jury convicted defendant of first-degree murder, MCL 750.316(1)(a), assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to prison terms of life for the first-degree murder conviction, twenty to thirty years for the assault conviction, and two years for the felony-firearm conviction. He appeals as of right. We affirm.

This case arises from the fatal shooting of Dionte Mack and the nonfatal shooting of Lawrence Landrum. Defendant first argues the prosecutor failed to present sufficient evidence of premeditation and deliberation to sustain the first-degree murder conviction. In reviewing the sufficiency of the evidence this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Gonzalez*, 468 Mich 636, 640; 664 NW2d 159 (2003). All reasonable inferences and credibility determinations must be drawn in support of the jury's verdict. *Id.* at 640-641.

To establish premeditation and deliberation a prosecutor must show that the time between the initial homicidal intent and the action was long enough to afford a reasonable person time to take a second look. *Id.* at 641. Premeditation and deliberation can be inferred from the surrounding circumstances and may be established through evidence of such factors as the prior relationship of the parties, the defendant's actions before the killing, the circumstances of the killing, and the defendant's conduct after the victim's death. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

The prosecutor theorized that defendant killed Mack because Mack witnessed defendant shoot Landrum. The prosecutor presented evidence that defendant was involved in an altercation with Landrum while Mack was asleep on a couch. Landrum testified that Mack awoke after

defendant fired a gunshot that struck Landrum in the head. Mack immediately ran to the back of the house and defendant ran after him. Officers later found Mack's body in a bedroom closet. According to the medical examiner, Mack sustained three gunshot wounds. The shots to the back of Mack's head and to the right arm were delivered at a distance of more than four feet and would have immediately incapacitated him. The medical examiner opined that the third shot was delivered to Mack's temple, only inches away from his head, execution style. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a reasonable jury to find that defendant had sufficient time to contemplate his actions after the incapacitating shots and that he subsequently fired the shot to Mack's temple with premeditation and deliberation.

Defendant also argues that trial counsel was ineffective for failing to bring the lack of DNA evidence to the attention of the jury.¹ To establish a claim of ineffective assistance of counsel defendant must prove that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Because defendant did not raise this issue in a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent from the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004).

We reject the argument that defense counsel was ineffective for not bringing the lack of DNA evidence to the attention of the jury. In his closing argument defense counsel seized on this subject, questioning why blood samples were not taken from the floors of the crime scene and why the police did not seek to determine the source of the blood. To the extent possible defense counsel raised the issue of the lack of DNA evidence placing defendant at the crime scene. It was up to the jury to determine the weight given to his argument. Defendant has not demonstrated that defense counsel was ineffective in this regard.

Defendant also asserts that trial counsel was ineffective for failing to object to testimony that defendant was found in Kansas approximately four years after the shootings occurred. He asserts the testimony was presented as evidence of flight. But at the time the evidence was presented the prosecutor did not intimate that defendant fled. Rather, the evidence was presented to explain why the case was being tried so many years after the shootings occurred. Defense counsel was not ineffective for failing to object to the testimony. See *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003) (counsel is not required to make a futile objection).

Defendant additionally argues that the trial court erred when, relying on this testimony, it instructed the jury on flight over his objection. Assuming, without deciding, that the trial court erred by instructing the jury on flight, a nonstructural constitutional error does not require reversal if it is clear beyond a reasonable doubt that a rational jury would have found the

¹ Defendant's actual argument is that trial counsel "failed to object to the lack of a legal foundation for the lack of DNA evidence presented." But it would be impossible for defense counsel to raise an objection to something that did not happen. Therefore, we believe that defendant is essentially arguing that defense counsel was ineffective for failing to bring the lack of DNA evidence to the attention of the jury.

defendant guilty even absent the error. *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). Witnesses placed defendant at the crime scene on the night of the shootings and he was seen carrying a .38-caliber gun. The slugs from Mack's body were fired from the same .38-caliber gun as the slug removed from the living room floor, which Landrum testified was the one that hit his hand. And Landrum identified defendant as the shooter immediately after the shootings occurred. Landrum's identification of defendant as the shooter never changed. Additionally, before the shootings, witnesses heard defendant coveting Landrum's dog. Landrum testified that defendant tried to steal his dog. Immediately after the shootings Landrum told police that he and defendant argued about defendant stealing Landrum's dog just before defendant shot Landrum. In light of the overwhelming evidence of defendant's guilt, the jury would have found defendant guilty even without the instruction on flight.

Lastly, defendant contends that several remarks by the prosecutor in her rebuttal closing argument were improper. This Court generally considers issues of prosecutorial misconduct on a case-by-case basis and must examine a prosecutor's remarks in context, and in light of the defendant's arguments. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Because defendant did not object contemporaneously to the remarks, however, this issue is unpreserved. Our review is therefore limited to plain error affecting defendant's substantial rights. *Id.*

Defendant first argues that the prosecutor improperly shifted the burden of proof to defendant when she stated that there was no evidence to indicate that the killer was someone other than defendant. Defense counsel argued that "whoever did the killing was not Demetrius Hardrick" and the prosecutor simply argued that the evidence only pointed to defendant as the killer. A prosecutor's argument that the evidence presented proves the defendant's guilt and that inculpatory evidence was unrefuted does not impermissibly shift the burden of proof. *People v Callon*, 256 Mich App 312, 330-331; 662 NW2d 501 (2003).

Defendant also argues that the prosecutor denigrated defense counsel when she (1) stated that defense counsel "had the audacity to attack Dione Mack," and (2) stated that defense counsel was "squirting ink in [the jurors'] eyes so Mr. Hardrick can avoid responsibility for his actions and the ink he sprays in your eyes are issues that are not relevant."

A prosecutor may not personally attack defense counsel, *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003), or suggest that defense counsel is intentionally attempting to mislead the jury, *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). Here, the prosecutor's remarks were not personal attacks on defense counsel but, rather, were attacks on defense counsel's closing argument. The prosecutor argued in rebuttal that the issues defense counsel raised were not germane to the ultimate question of whether defendant shot Mack and Landrum. She urged the jurors to stay focused on the relevant facts and not become confused by the irrelevant issues defense counsel raised in his attempt to establish reasonable doubt. The prosecutor's remarks, while colorful, see *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003), were not improper.

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Bill Schuette